Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BEN W. ALLUSTIARTE AND
LINDA M. ALLUSTIARTE,

Petitioners,

v.

W. AUSTIN COOPER, ESQ.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

(1) Whether the decision of U.S. Ninth Circuit Court deprived the Petitioners' Rights pursuant to the U.S. Constitution, Amendments I-X, and XIV of their rights to due process and equal protection of the law pursuant to the Constitution of the State of California, Article XX Sec.1.5.

(2) Whether the U.S. Ninth Circuit Court erred in determining that the bankruptcy court had jurisdiction over the exempt homestead property and that such property was not to be administered by the bankruptcy court. *Lockwood v. Exchange Bank*, 190 U.S. 294 23 Sup. Ct. 751 L. Ed.,1061.

(3) Whether the U.S. Ninth Circuit Court erred in misapplying the homestead exemption under the Constitution of the State of California which is controlled by the State Law (*Bank of Italy v. Bentley*, 1933), 217 Cal. 644, 653.

PARTIES TO THE PROCEEDING

Petitioners are debtors under Chapter XII under the now repealed Bankruptcy Act of 1898.

Respondent W. Austin Cooper was the trustee, now discharged, by the Honorable David E. Russell, Chief Judge U.S. Bankruptcy Court on August 26, 1996, the court in the petitioners' Chapter XII reorganization.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, farmers, under Chapter XII of the now repealed Bankruptcy Act of 1898, hereby petitions this Court to grant a writ of certiorari to review the memorandum and order of the United States Court of Appeals for the Ninth Circuit.

ORDER AND MEMORANDUM BELOW

The order and memorandum of the court of appeals was ordered not to be reported. It is set forth in Appendix (App.) A p. 3a ; App. B 4a, 5a. The District Court order affirming the bankruptcy court's determination of the amount of homestead exemption of the district court is set forth in App. C pp. 6a-8a.

JURISDICTION

The Order of the U.S. Ninth Circuit Court of Appeals was entered on April 23, 1997, App. A. p. 3a, and the Memorandum of the U.S. Ninth Circuit Court of Appeals was entered on December 19, 1996, App. B p.4a. The jurisdiction of this court, Petitioners believe, is invoked pursuant to 28 U.S.C. Sec.158(d), and the Bankruptcy Act of 1898 Section 24(c)(11 U.S.C. Sec.47). Petitioners' writ of certiorari is filed timely pursuant to this Court's letter dated May 22, 1997, William K. Suter, Clerk, by Milissa A. Blalock.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment [1791] to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property without due process of law."

The Fourteenth Amendment [1868] Section 1 of the United States Constitution provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of California [Homestead Protection] Article XX Section 1.5:

"The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families. [New section adopted June 8, 1976]."

STATEMENT OF THE CASE

A. INTRODUCTION and SUMMARY:

This case commenced by the Debtors/Petitioners Ben W. Allustiarte and Linda M. Allustiarte filing their original voluntary petitions, Bankr. No.79-3763-XII and 79-3764-XII for relief under Section 422, Rule 12-6 in a Chapter XII proceeding of the now repealed Bankruptcy Act of 1898 for reorganization on August 15, 1979 in the United States District Court For The Eastern District of California, Sacramento, Division.

At the same time also filed their schedule of EXEMPT PROPERTY. In their Statement of Affairs for Bankrupts Engaged in Business, both Debtors stated they were engaged in the business of farming and grazing.[1]

Petitioners/Debtors filed their Real Property arrangement Plan under Chapter XII commencing in 1979. Three (3) subsequent amended plans were filed and rejected. The court did not dismiss the Petitioners bankruptcy proceedings. (Bankruptcy Act Sec.38(1). The jurisdiction of the bankruptcy court was to review petitions, make the adjudication or dismiss the petitions. The court did not have the power under

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[1] This case is governed by the Act, ch. 541, 30 Stat. 544 (codified as amended at former 11 U.S.C. Sec.1-1103 (1976)). Although the Act was repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Sec.401(a), 92 Stat. 2682 (1978) ("the Code"), it remains applicable to cases in which the original petition was filed before October 1, 1979. *Southwestern Media Inc. v. Rau,* 708 F.2d 419, 421 n.1 (9th Cir. 1983).

Chapter XII of the bankruptcy act to adjudicate Petitioners without their Consent. (Sec. 484 and Rule 12-41(e) so a dismissal only is in order. *Kunze v. Prudential Ins. Co. of America,* 106 F.2d 917.)

A subsequent Real Property Plan of Arrangement was prepared by the then trustee Austin W. Cooper and Judge LOREN S. DAHL. (Bankruptcy Act Sec. 466, 467 (11 U.S.C. Sec. 866, 867) Bankruptcy Act Rule 12-36(a) (b). The plan was filed on January 19, 1994 by unauthorized persons.

Petitioners on August 10, 1964, filed their DECLARATION OF HOMESTEAD in the Stanislaus County Recorder's office in the State of California, pursuant to state law.

Petitioners, thereafter, on July 26, 1993 filed their UPDATE OF DECLARATION OF HOMESTEAD. On or about November 12, 1993 the trustee filed a MOTION TO DETERMINE AMOUNT OF HOMESTEAD EXEMPTION. This was done in preparation to sell Petitioners' residence at 1021 Stanford Avenue, Modesto, California. Petitioners contend this amounts to liquidation of their property contrary to federal bankruptcy law that a farmer can not be adjudicated or liquidated under Chapter XII without his consent to the adjudication filed in writing with the court, debtors do not consent, Bankruptcy Act Sec.484 (11 U.S.C. Sec.884), Bankruptcy Rule 12-41(e), the same is true under the Bankruptcy Reform Act of 1978 and the Bankruptcy Code. *In re Blanton Smith Corp.*,7 B.R. 410 (Bkrtpcy Tenn. 1980)

Additionally Petitioners contend that by misapplying the exemptions set forth in the California Constitution and the enabling statutes that they were denied equal protection as set forth previously.

B. FACTUAL BACKGROUND

Petitioners filed their original HOMESTEAD PETITION on August 10, 1964 at the Recorder's office in Stanislaus County, State of California.

At the time Petitioners filed their Homestead Declaration the residence at 1021 Stanford Avenue was valued at ($35,000.00 and the amount of the Homestead exemption allowed in the State of California was $40,000.00). Therefore the entire property was covered by the exemption. Petitioners contend that the value of the exempt property was, pursuant to the laws of the State of California , below the allowable exemption amount at the time of the filing of their petition for reorganization. The Bankruptcy Court acquired *no* jurisdiction over the subject exempt property (BANKRUPTCY ACT, Section 6) (11 U.S.C. Sec. 24).

The Homestead Protection of the State of California, where the homestead owner is 65 years or older or is a disabled veteran, then the exemption extends to $100,000.00. CALIFORNIA CODE OF CIVIL PROCEDURE Sections 704, 730(a)(3) and Section 704.780, the total exemption is granted to Disabled Veterans of the United States by the State of California. Petitioner is a disabled WW II veteran, and both are natural born citizens of the United States. Petitioners ages are 73 and 75.

C. MEMORANDUM

Petitioners believe the U.S. Ninth Circuit Court had jurisdiction pursuant to Bankruptcy Act of 1898, Section 24(a) (11 U.S.C. Sec.47) Jurisdiction of Appellate Court, pursuant to the procedures and rules of the now repealed Bankruptcy Act of 1898.

The SUPREME COURT OF THE UNITED STATES now has jurisdiction pursuant to Bankruptcy Act. Section 24(c)(11 U.S.C. Sec.47) which states:

> "C. The Supreme Court of the United States is hereby vested with jurisdictions to review judgment, decrees, and orders of the United States courts of appeals in proceeding under this Act in accordance with the provisions of the laws of the United States, now in force or such as may hereafter be enacted."

The instant case arises under the BANKRUPTCY ACT OF 1898, and not the Bankruptcy Code, 28 U.S.C. Sec. 158(d) App. B, p.5a. Const. Amend. V, X, and XIV, California Constitution Article XX Sec. 1.5. Protection of Homestead. Supreme Court Rule 11, 28 U.S.C. Sec. 2403 (a)(b) and 28 U.S.C. Sec. 451 Rule 29.

D. BANKRUPTCY COURT JURISDICTION

The SUPREME COURT OF THE UNITED STATES has stated in *Lockwood v. Exchange Bank*, 190 U.S. 294 (1902) A court of Bankruptcy has *no jurisdiction* to enforce, against the bankrupts exemption the rights of unsecured creditors whose evidence of indebtedness contains the waiver of homestead exemption authorized by the State Constitution and laws by reason the authority conferred upon such court by the Bankruptcy Act of 1898 (30 Stat. at L. 544 Chap. 541 U.S. Comp. Stat. 1901 p. 3418) to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupts estate to be determined.

A court of bankruptcy *has no jurisdiction* to enforce, against the bankrupt's exemption, the rights of creditors whose evidences of indebtedness contain the waiver of homestead and exemptions authorized by the state Constitution and laws, by reason of the authority conferred

upon such court by the bankruptcy act of 1898 (30 Stat. at L.544, Chap. 541 U.S. Comp. Stat. 1901 p.3418) to control exempt property in order to *set it aside*, and thus *exclude* it from the assets of the bankrupts estate to be administered.

The bankruptcy court *has no jurisdiction* over exempt property and *no authority* to administer the same *Re Moore*, 112 Fed. 280; *Powers Dry Goods Co. v. Nelson* 10 N.D. 580,58 L.R.A. 770,88 N.W. 703.

The title to the exempt property *never vests in the trustee* of the bankrupt for any purpose, and therefore such property *cannot be administered by the bankruptcy court*. Section 6 (11 U.S.C. Sec.24), the property of the bankrupt which is to vest in the trustee as of the date of the adjudication in bankruptcy, ". . . *EXCEPT*," . . . in so far as it is to property which is *exempt*.

The exemption is created by the state law, and the assignee acquires *no title to the exempt property*. If a creditor has a claim against it, he must prosecute that claim in a court which has jurisdiction over the property which the bankruptcy court *has not*.

The terms of the bankruptcy act of 1898 above set out, is clear evidence of the intention of Congress that title to the property of a bankrupt, exempt by state laws, should remain in the bankrupt, and not pass to his representatives in bankruptcy, as did the provisions of the act of 1867 considered in *Re Bass 3 Woods* 382 Fed. Cas. No.1,091. The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to *set it aside*, and thus *exclude* it from the assets of the bankruptcy estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which

the act, in unambiguous language, declares *shall not pass from the bankrupt or become a part of the bankruptcy assets*. In other words, it is made as clear as anything can be, that such exempt property constitutes *no part* of the assets in bankruptcy. *Lockwood supra*.

In re Ingram 125 Fed. Reporter p. 913 at 915 (CCA 8th Cir.1903) the homestead of a bankrupt *does not pass to his trustee and the court of bankruptcy is without power to order its sale*.

No jurisdiction has ever been held by the trustee or the bankruptcy court, other than to set aside the exempt property. Bankr. Act Sec.6 (11 U.S.C. Sec.110) 4 COLLIER ON BANKR 541-02[3] (15th Ed. 1990) *Bambaugh vs. Los Angeles Morris Plan* (9th Cir. 1929) page 816, 30 Fed. Reporter 2d Series.

The time for filing objections to exempt property is set forth in the Bankr. Act of July 1898 c. 541 Sec.47, 30 Stat 557 (Comp. St. 1913 Sec. 9631), which requires the trustee to set apart the bankrupt's exemption and report the items and estimated value thereof to the court *as soon as practical after his appointment*. General Order of Bankruptcy No. XVII (89 Fed. viii 32 C.C.A. xix provides that the trustee make a report to the Court, . . . within 20 days, . . . of the articles set off to the bankrupt and that any creditor may take exemptions to the determination of the trustee within, . . . 20 days, . . . after filing of the report, the rule is, . . . mandatory. . . and the District Court has no discretion, . . . and could *NOT*, . . . permit the filing of objections a mere 21 days, much less the fifteen years present in the instant case.(*In Re Krecun* (CCA 7th Cir. 1916) No. 2279. Also see *In re Cotton* 183 Federal reporter (District Court S.D. Georgia S.W.D. 1910).

Petitioners are entitled to due process and the equal protection of the law. U.S. Const. Amendment V and XIV.

In the instant case the trustee neglected his fiduciary mandatory obligation and no creditor ever objected to the debtors exempt property. *Lockwood supra*, *Ingram supra, Banbaugh supra*.

The Appellants are claiming the Homestead in whole, California Code of Civil Procedure, Sec. 704, 770; 704,780.

The determination of the amount of Homestead Exemption under Chapter XII of the Act is not a function of the trustee or the bankruptcy court other, . . . that to *set it aside as exempt property*.

For all the foregoing reasons, it would be a great miscarriage of justice to allow the trustee and the bankruptcy court jurisdiction in federal court while the Supreme Court of the United States has ruled in *Lockwood supra* and *Ingram, supra*, that both of the above lack jurisdiction, while exempt property *does not* pass to the trustee and the court is *without power* to rule on the exemption amount of the residence. Therefore, the amount of the exempt property is determined by state law. California Code of Civil Procedure. Sec. 740, 470(b).

Trustees only right in exempt property is to set it aside for the Bankrupt (Bankruptcy Act Sec. 70 [11 U.S.C. 110] *In re Rabb*, N.D. Texas Dallas Division, 1927 No. 2477.

The title therefore did not pass to the trustee but remained in the bankrupt and was not subject to the administration by the bankruptcy court. Section 70 Bankruptcy Act (11 U.S.C. Sec. 110). The fact that the act conferred on the bankruptcy court authority to control exempt property, in order to set it aside, does not mean that the court can administrate it as an asset of the estate. It is therefore of no concern to the general creditors that disposition of the bankrupt makes exempt

In a voluntary petition the Petitioners are not considered bankrupts, but only debtors under Chapter XII of the now repealed Bankruptcy Act of 1898. Property, and a mortgage transfer thereof cannot be treated as a preference.

In no event would the trustee be entitled to the property *Lockwood v. Exchange Bank*, 190 U.S. 294, 23 S. Ct. 751, 47 L. Ed. 1061; *Brandemberg, Bankruptcy*, Sec. 957 *Huntington v. Baskerville*, (C.C.A.) 192 F.813; *First National Bank v. Lanz*, (C.C.A.) 202 F.117 cited by U.S. Ninth Circuit in *Baumbaugh v. Los Angeles Morris Plan*, 30 F. Reporter 2d Series p. 816 (9th Cir. 1929).

In the instant case there were no *objections* to Petitioners exempt property within the mandatory statues 20 days from the filing of the exemption, since no timely objection is filed it automatically results in the property being exempt from inclusion in the Bankruptcy Estate. *Taylor v. Freedland & Frong*, U.S. 112 S. Ct. 1644 L. Ed. 280 (1992).

The SUPREME COURT OF THE UNITED STATES states that law of the states governs real property and a federal bankruptcy court should take whatever steps are necessary to ensure that the mortgages is afforded in federal court the same protection he would have under state law if no bankruptcy had ensued and to be determined by state law. *Butner v. United States*, 440 U.S. 48, U.S. Supreme Court Reporter, 58 L. Ed. 2d p. 913-917 (1979) to do otherwise would deny Petitioners their rights to Const. Amendment V and XIV, equal protection of the laws as well as California Constitution Article XX Sec. 1.5.

Homestead law is to be construed liberally in favor of the *Debtor* and should be so applied as to make it an instrument for the accomplishment of fraud or imposition. *King v. Sweatt*, 115 Fed. Supp. 215.

The U.S. Ninth Circuit Court has already clearly held that a bankruptcy court has "no jurisdiction" over homestead property and that such property cannot be administered by the bankruptcy court. *In re Browne*, 462 F.2d 129, 132 (9th Cir.1972): 28 U.S.C. Sec. 1334. State law determines whether property is homestead property. This is because bankruptcy court only has jurisdiction over matters that could "conceivably have any effect" on the estate. *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988) (applying 28 U.S.C. 1334 (b)). An action relating to homestead property could not conceivably have any effect on the estate. Accordingly the bankruptcy court lacks jurisdiction over such property. *In re Turner*, 724 F. 2d 338, 341 (2d Cir. 1983)denying Petitioners their equal protection of the laws U.S. Constitution (Const) Amendment (Amend.) V and XIV, denying Petitioners their rights under the California State law.

The homestead of a bankrupt, exempt from his general debts under the laws of the state, does not pass to the trustee, and the court of bankruptcy is without power to order its sale because a particular creditor may have the right, under such laws, to subject it to the payment of his debt. *Ingram v. Wilson*, (8th C.C.A. 1903) No. 1, 882.

White v Stump, 266 U.S. 310 states the right to a homestead exemption is a privilege given by the domicile state of the debtor and the entitlement is governed by the terms of the applicable state statues. *White, supra.*

Exempt property constitutes no part of the bankruptcy estate and the jurisdiction of the bankruptcy court is limited to the ascertainment and setting off to the bankrupt of the exempt property. *Collier on Bankruptcy*, 1-A 6.05.

Rule 14.1(d), Reports of the Memorandum and Order, are identified as Appendix A, B and C. Rule 14.1(e), basis

for Jurisdiction in this Court reference to the Memorandum, of the U.S. Court of Appeals for the Ninth Circuit was entered in this case as Appendix A filed on December 19, 1996. The U.S. District Court's "Order Affirming Bankruptcy Courts Determination of Amount of Homestead Exemption" as Appendix B filed on April 27, 1995, and the U.S. Court of Appeals for the Ninth Circuit's "Order" Appendix C, filed on April 23, 1997.

The petition is filed under this Court's Rule 11 and believe it is imperative that this Court grant the petition for a writ of certiorari to review the case. It is of imperative public importance as to justify deviation from normal appellant practice to require immediate determination in this Court, 28 U.S.C. § 2101(e), where the bankruptcy court is ruling on EXEMPT property while lacking jurisdiction, reference is made to the foregoing cites, depriving Petitioners of their due process and protection of the laws U.S. Constitution Amend. V, X, XIV and the right of the State of California Constitution Article XX 1.5 [Homestead Exemption]. Petitioners jurisdiction is by state law which is controlling *Butner, supra* (iv) The statutory provisions believe to confer on this Court's jurisdiction is to review on the writ of certiorari, the Order, and Memorandum in this Court of last resort, where the petition for the writ was timely filed, to rule that the bankruptcy court lacks jurisdiction on EXEMPT PROPERTY, which is determined by state law. (v) The notification by Rule 29.4(b) and (c) has been made.

Pursuant to Rule 14.1(g) the federal question was sought in the U.S. District Court where Petitioners elaborated in appellant's opening brief that the bankruptcy court lacked jurisdiction on timely filed EXEMPT PROPERTY on appeal to the U.S. Court of Appeals for the Ninth Circuit

Petitioners elaborated again and cited that the bankruptcy court lacks jurisdiction is identified in Petitioners/Appellants Excerpts of Records as Exhibit G.

Rule 14.1(h) The direct and concise argument amplifying the reasons relied on for allowance of the writ are:

(a) The United States Court of Appeals has entered its decision which Petitioners believe may be contrary to its other decisions that a bankruptcy court lacks jurisdiction over EXEMPT PROPERTY. *Baumbaugh, supra* And in its cites stating in no event would the trustee be entitled to the property citing *Lockwood, supra*, BRANDDENBERG BANKRUPTCY Sec. 954 *Huntington, supra, First National Bank, supra and Brown, supra.*

(b) The United States Court of Appeals has decided an important question which also conflicts with other United States Appeals Courts that state bankruptcy courts have no jurisdiction over EXEMPT PROPERTY. *In re Ingram, supra, Power Dry, supra, Re Moore, supra.*

The United States Court of Appeals has decided an important question of law stating in its Memorandum that Petitioners Homestead Exemption is in the amount of $40,00.00 while stating in other cites that bankruptcy courts lack jurisdiction on EXEMPT PROPERTY which is governed by state law, and only state law will rule on the amount of the Homestead Exemption. California Constitution Article XX 1.5, which presently states that citizens of State of California over the age of 65, and Disabled

American Veterans are entitled to $100,00. . . Petitioners believe the court knowing bankruptcy courts lack jurisdiction on Exempt Property, should let the state courts at the proper time decide the amount of the Homestead Exemption, and not now by the lower courts.

The amount of the Homestead Exemption is determined only when an application for an order is filed in the California State Court for the sale of the real property and only by a judgment lien creditor C.C.C.P. section 704.710-704.850. The former trustee, now discharged as the trustee in the Allustiarte's estates by the U.S. Bankruptcy Chief Judge David E. Russell on August 26, 1996 is not a creditor to be preparing to sell Petitioners residence at 1021 Stanford Avenue, Modesto, California while lacking jurisdiction.

No creditor ever claimed an interest in the exempt property nor has anyone filed an application for an order to sell the homestead residence. Petitioners believe by the laws of the Constitution of the State of California Article XX 1.5 that the amount of the exemption will not be known until the decision is rendered by the Superior Court of the State of California.

Petitioners are being deprived of their U.S. Constitutional Rights. Amendments V, X and XIV and the Constitution of the State of California as natural born citizens as well as a Disabled American Veterans which occurred during WW II while serving in the United States Third Army.

The United States Court of Appeals has decided an important question by federal law while jurisdiction is under state law. *Butner, supra.* The question should be settled again by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

(c) The United States Court of Appeals and the United States District Court have ruled in the instant case while the bankruptcy court lacked jurisdiction. The question should be settled by this Court that the former discharged trustee and the bankruptcy court had, . . . No . . . jurisdiction but to set the EXEMPT PROPERTY aside which was never a part of the bankruptcy assets in the Petitioners proceedings.

Since there are no findings of fact or conclusions of law in the instant case there are no asserted error, erroneous to factual findings or the misapplication of a properly stated rule of law. The Petition for a Writ of Certiorari should be granted, Supreme Court Rule 10.

Rule 14.1(I) The United States District Court was well aware that the bankruptcy court did not order, lodge or file any findings of fact or conclusions of law at the bankruptcy court level. The United States District Court was also aware that it lacked jurisdiction to make its own findings of fact and conclusions of law. *In re Hall Bayoutree Assoc. Ltd.* 939 F. 2d 802, 804 (9th Cir. 1991). Petitioners/Appellants in Appellants Opening Brief to the United States District Court, in their STATEMENT OF FACTS states to the court that there were no findings of fact or conclusions of law.

Relief sought is to grant the writ where bankruptcy court lacks jurisdiction over exempt property and controlled by state law.

Only recently the discharged trustee filed a motion to sell Petitioners homesteaded EXEMPT PROPERTY, and the court approved the motion, therefore depriving Petitioners due process and the equal protection of the law, U.S. Constitution Amendments V, X and XIV, as well as the States of California Constitution Article XX 1.5.

E. LAWS OF THE STATE OF CALIFORNIA

Petitioners are of the opinion that California law is supporting in the instant case, where no one objected to Petitioners homestead exemption. The trustee, as well as the bankruptcy court lack jurisdiction over the exempt property.

Petitioners content that the application of California law allows them an automatic increase in the amount of the exemption as the California law allows others situated as natural-born senior citizens and disabled American Veterans. (Civil Code of Civil Procedures section 704.730(a)(3) and section 704.780.)

Petitioners on August 10, 1964, filed a Declaration of Homestead in the Stanislaus County Recorder's office in the State of California pursuant to State Law (former California Civil Code sections 1237-1304 now *California Code of Civil Procedures*, Section 709-910).

Petitioners on July 26, 1993 filed their updated Declaration of Homestead, which updated the original Declaration of Homestead filed on August 10, 1964. *White, supra*, holds that the exemption may not be enlarged by anything a debtor may do. In the instant appeal Petitioners didn't do anything which attempted to enlarge their

exemption, however they contend that they were allowed the increased amount of the exemption by operation of California statutory law and entitled to the additional exemption amount as a matter of California law (C.C.P. section 704.965). The increase is retroactive upon amendment of the statue. By denying Petitioners the above increase will be depriving Petitioners of their Const. Amend. V and XIV as well as the equal protection of the laws of the State of California.

No creditor has ever claimed an interest in the homestead exemption. It is well-known to the court that no interest exists over the homestead exemption.

In an analogous situation, however where debtors are allowed to change their exemption is shown in other cases which have allowed post-petition filing of a homestead, where the debtors' domicile state laws allowed such a filing. *Myers v. Matley*, 318 U.S. 620 [Nevada]. The rule that the petition date is controlling is thus modified where state law allows such post-bankruptcy petition filing.

At the time of the filing of the instant petition the real property in question had a market value of $35,000.00, therefore under California law the exemption would have exempted the entire property since the homestead exemption at the time was $40,000.00. App. C, p. 6a, 7a, and 8a. After passage of time the creditors would, if the order of the Bankruptcy Court is allowed to stand, will receive a landfall of approximately $80,000 which will frustrate the public policy of the State of California, as set forth below.

In the State of California the protection for homestead and other property of heads of households from forced sale is governed by California Constitution, Art. XX, section 1.5. The procedural and substantive requirements are governed by

the CALIFORNIA CODE OF CIVIL PROCEDURE, sections 704.910-704.995.

In addition to the declared homestead as set force above the State of California allowed the claiming of a separate homestead exemption when there is an application for an order of a sale of a dwelling. The procedural and substantive requirements for an order for sale of real property and the allowable claim of exemption are set forth in CALIFORNIA CODE OF CIVIL PROCEDURE, sections 704.710-704.850.

Under California law a head of household who has had a judgement lien attached to his real property dwelling that is the actual residence may claim a homestead exemption pursuant to C.C.P. 704.710, 704.720. The head of a household is entitled to this exemption regardless of whether a declared homestead has been recorded. (C.C.P. 704.910-704.995).

The California constitution requires the legislature to enact laws to protect a certain portion of the homestead (Cal. Const. Art. XX, section 1.5.) The policy underlying the homestead legislation is to provide a place where families may reside free from anxiety that it may be taken from them. (*Estate of Vannucci*, 103 C.A. 3d 175, 180, 163 Cal. Rptr.11)

The courts have held that the laws regarding homesteads are to be liberally construed in or to obtain the beneficial object of the public policy which created the legislation and to carry out the purpose of the legislation. (*Schoenfeld v. Norberg,* 11 Cal. 18.

Spencer v. Lowrey, 235 Cal. App. 2d Supp. 905, 286 P. 2d 1019 (1955). California courts are not bound by a federal court's opinion on matters of California law. *Bank of Italy v. Bentley*, 217 Cal 644, 653 [20 P. 2d 940] (1933).

The constitutionality of an Act of Congress is drawn into question and 28 U.S.C. §2403(a) may apply and shall be served on the Solicitor General of the United States. Petitioners believe that pursuant to 28 U.S.C. §2403(a) certified to the Attorney General that the constitutionality of an Act of Congress was drawn into question

Petitioners believe 28 U.S.C. §2403(a) may apply and shall be served on the Attorney General of the State of California and certified to the State Attorney General the fact that the constitutionality of a statute of the State of California was drawn into question.

It is clear that the decision of the Ninth circuit has misapplied state and federal law in holding that the bankruptcy court had subject matter jurisdiction over the exempt property of petitioners. It is equally clear that the Ninth Circuit has misinterpreted this courts' holding in *Lockwood*, *supra*, and its progeny. To let this decision stand will in effect deprive petitioners of property which is constitutionally protected. California courts are not bound by federal courts rulings.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: BEN W. ALLUSTIARTE and LINDA M. ALLUSTIARTE,	)	No. 95-16285
	)	D.C.
	)	No. CV-93-01941
Debtors,	)	EJG
	)	
BEN W. ALLUSTIARTE; LINDA M.ALLUSTIARTE,	)	
	)	
	)	
MEMORANDUM*	)	
Debtors-Appellants,	)	
v.	)	
W. AUSTIN COOPER,	)	
Trustee-Appellee.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Submitted December 16, 1996**

Before: SNEED, TROTT, and THOMAS, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir R. 34-4.

Chapter 12 Debtors Ben and Linda Allustiarte appeal the district court's affirmance of the bankruptcy court's order determining that they have a $40,000 homestead exemption under California Civil Code Sec. 1260 and 1261. We have jurisdiction pursuant to 28 U.S.C. Sec. 158(d), and we affirm.

"We review de novo the district court's review of a bankruptcy court's decision." *Great W. Bank v. Sierra Woods Group*, 953 F.2d 1174, 1176 (9th Cir. 1992). We review the bankruptcy court's factual findings for clear error and its legal conclusions de novo. *Id.*

Here, in its conclusions of law, the bankruptcy court held "[t]he applicable homestead exemption amount is determined at the filing of the petition for bankruptcy." Based upon California Civil Code Sec. 1260, on date the Allustiartes filed their petition, that amount was $40,000. The Allustiartes contend that they are entitled to a $100,000 homestead exemption based upon amendments to California law[1] that were made subsequent to the filing of their bankruptcy petition. The Allustiartes, contention lacks merit because the bankruptcy court correctly held that the Allustiartes were not entitled to the $100,000 homestead exemption that California subsequently allowed after their petition was filed.

AFFIRMED.[2]

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[1] Section 1260 has been repaled. The homestead exemption is now codified at Cal. Civ. Proc. Code Sec.704.730.

[2] Because of our disposition of this case, Cooper's motion to dismiss is denied. Furthermore, Cooper's motion for sanctions pursuant to Fed. R. App. P. 38 is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

IN RE CIV. NO. S-93-1941-EJG

BEN W. ALLUSTIARTE and
LINDA M. ALLUSTIARTE,
Debtors.

ORDER AFFIRMING BANKRUPTCY COURT'S DETERMINATION OF AMOUNT OF HOMESTEAD EXEMPTION

_____ /

This is an appeal by the debtors from the bankruptcy court's December 13, 1993, Order Determining Amount of Homestead Exemption. The debtors contend that the bankruptcy court lacks jurisdiction over exempt property; therefore, its order determining the amount of the debtors' homestead exemption in real property located at 1021 Stanford Avenue, Modesto, California is erroneous. For the reasons set forth below, the bankruptcy court's order is affirmed.

BACKGROUND

On August 15, 1979, the date the debtors filed their petition in bankruptcy under Chapter XII of the Bankruptcy Act of 1898 , California law entitled them to a homestead exemption in the amount of $40,000. *See* California Civil Code Sec. 1260, as amended by 1978 Cal. Stats. On July 26, 1993, the debtors purported to amend their declaration of

homestead by filing an "Update of Declaration of Homestead", in which they claimed an exemption of $100,000. Thereafter the trustee of the bankruptcy estate filed the motion which is the subject of this appeal, seeking a determination form the bankruptcy court that the debtors' homestead exemption was limited to $40,000. The bankruptcy court granted the trustee's motion and this appeal ensued.

DISCUSSION

The debtors first argue that the act of filing the original declaration of homestead removed the property from the bankruptcy estate; therefor the bankruptcy court lacked jurisdiction to determine the validity of their homestead exemption. In support they rely on *Lockwood v. Exchange Bank*, 190 U.S. 194 (1902). While that case stands for the general proposition that exempt property does not pass to the trustee as part of the bankruptcy estate and cannot be administered by the bankruptcy court, the debtors overlook the fact that home is not totally exempt. Under California law in effect at the time their petition was filed, the debtors were limited to a homestead exemption of $40,000. Since the debtors concede that the home is worth at least $120,000. The bankruptcy court retains jurisdiction over the non-exempt portion of the property. *See Browne v. San Luis Obispo National Bank*, 462 F.2d 129, 132 (9th Cir. 1972).

The amount of a homestead exemption is determined by the state laws in force at the time of the filling of the bankruptcy petition. *Myers v. Matley*, 318 U.S. 622, 624 (1943). "{T}he bankrupt's right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy and cannot thereafter be enlarged or altered by anything the bankrupt may do . . . ." *Id.* at 628 *See also, In re Combs*, 166 B.R. 417, 418 (bnkr. N.D. Cal. 1994) (exemption rights determined at date of petition). The

debtors' petition was filed August 15, 1979. At the time section 1260 of the California Civil Code provided a head of household exemption of $40,000. California law provides there can be only one valid declared homestead. Therefore, the debtor's purported "Update of Declaration of Homestead", filed in 1993 does not terminate the initial homestead. *See Toewers v. Curry*, 247 F.2d 738 (9th Cir. 1957). Since the debtors have not effectively terminated the initial homestead, the amount of the exemption remains at $40,000.

CONCLUSION

The bankruptcy court had jurisdiction to determine the amount of the debtors' homestead exemption. That court's order determining the amount to be $40,000 is affirmed.

IT IS SO ORDERED.

Dated: April 25, 1995

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-16285

BEN W. ALLUSTIARTE and LINDA M. ALLUSTIARTE
Appellants/Debtors

v.

W. AUSTIN COOPER, ESQ.
Respondent.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
(Sacramento Division)

[Hon. Edward J. Garcia, U.S. District Court Judge]

Before
Sneed, *Circuit Judge*,
Trott, *Circuit Judge*,
and Thomas, *Circuit Judge*.

Philip J. Rhodes, Attorney for W. Austin Cooper, Trustee.
Donald R. Reynolds, Counsel for the Petitioners
Ben W. Allustiarte and Linda M. Allustiarte.

[DECEMBER 19, 1996]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: BEN W. ALLUSTIARTE and LINDA M. ALLUSTIARTE, Debtors,	) No. 95-16285)) D.C.) No. CV-93-01941) EJG) Eastern California) (Sacramento)
BEN W. ALLUSTIARTE; LINDA M. ALLUSTIARTE, Debtors-Appellants, v. W. AUSTIN COOPER, Trustee-Appellee	)))) ORDER)))

Before: SNEED, TROTT, and THOMAS, Circuit Judges.

The petition for rehearing is denied.